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Paper No. 5
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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International Marketing Systems, Ltd.
v.
Absopure Water Company

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Cancellation No. 30,491

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Stephen P. McNamara of St.Onge Steward Johnston & Reens LLC for International Marketing Systems, Ltd.

Elizabeth F. Janda of Brooks & Kushman P.C. for Absopure Water Company.

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Before Cissel, Hairston and Walters, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

International Marketing Systems, Ltd. (petitioner) has petitioned to cancel a registration owned by Absopure Water Company (respondent) for the mark MONTREAUX for sparkling mineral water.[1] In its cancellation petition, petitioner alleges that it filed an application to register the mark QUALITY MONTREAUX COFFEES and design

[1] Registration No. 1,301,998 issued October 23, 1984, Sections 8 & 15 affidavit filed.

for “instant cappuchino mix”; that registration of its application has been refused

in view of respondent's registration for the mark MONTREAUX; that respondent has failed to use the mark MONTREAUX in commerce in connection with sparkling mineral water for a period in excess of three years and that respondent does not intend to resume use of the mark in connection with such goods.

Respondent, in its answer, denied the salient allegations of abandonment and asserted that it has regularly used the MONTREAUX mark in connection with sparkling mineral water and that it intends to continue to use the mark in connection with such goods.

The record in this case is sparse. It consists of the pleadings; the file of the involved registration; and respondent's responses to petitioner's request for admissions submitted under notice of reliance.[2] Respondent did not take testimony or offer any other evidence in its behalf.

Both parties filed briefs on the case, but no oral hearing was requested.

[2] Although petitioner also submitted under Notice of Reliance a printout of pages from respondent's website, this material is not proper subject matter for a Notice of Reliance. See Trademark Rule 2.122(e). Thus, we have not considered the printout in reaching our decision herein. We hasten to add that even if we had considered the printout, our decision herein would be the same.

With respect to the issue of abandonment, petitioner maintains that respondent admitted, in response to petitioner's request for admissions, that it did not advertise or make new sales of MONTREAUX sparkling mineral water to the general public in 2000; and that this admission, along with the fact that respondent's product is not advertised at its website, demonstrates prima facie that respondent has abandoned the mark.

Respondent, on the other hand, argues that in response to petitioner's request for admissions, respondent denied that it did not sell sparkling mineral water bearing the MONTREAUX mark from 1997 through 1999; and that although respondent admitted that it did not advertise or make new sales to the general public in 2000, it asserted that respondent's products may have been in the channels of distribution during this time. Respondent argues that the admissions relied upon by petitioner do not support a three-year period of nonuse and petitioner has not established a prima facie case of abandonment.

A federal registration of a trademark may be canceled if the mark is abandoned. Section 45 of the Trademark Act provides, in pertinent part, that a mark is abandoned when the following occurs:

> When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for three consecutive years shall be prima facie evidence of abandonment.

A petitioner claiming abandonment has the burden of establishing the case by a preponderance of the evidence. Introduction of evidence of nonuse of the mark for three consecutive years constitutes a prima facie showing of abandonment and shifts the burden to the party contesting the abandonment to show either evidence to disprove the underlying facts triggering the presumption of three years nonuse, or evidence of an intent to resume use to disprove the presumed fact of no intent to resume use.

In this case, we find that petitioner has not shown a prima facie case of abandonment. At most, respondent's responses to petitioner's request for admissions show that petitioner did not use the mark during 2000, a period of one year. This is far short of the three years of nonuse necessary to establish a prima facie case of abandonment.

Decision: The petition to cancel is dismissed.